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GAMBLING TODAY VIA THE "FREE REPLAY" PINBALL MACHINE

I. INTRODUCTION

The terms "gambling" and "gaming" as used today have a meaning notorious, and generally in the United States,¹ a sanction is found annexed to these words in statutory and judicial pronouncements. Phonetically, the fundamental word from which these derivatives issued was an old Anglo-Saxon term, "*gamen*", which originally was defined as "pleasure, sport",² but shortly thereafter took on the meaning of "to play".³ In modern legal parlance, the expression "gambling" consists of three elements; the payment of a price or consideration for a chance to gain a prize.⁴

The practice of gambling appears to have its origin in a psychological stimulus inherent in human nature generally, and thus, the natural development of gambling among the most primitive peoples, and its perseverance throughout history is explained.⁵ The chance of acquiring a greater return by risking a lesser value was an inducement to various forms of gaming among the ancient Egyptians, Chinese and Japanese, the Hebrews, the Greeks and Romans, and the early Germanic Tribes.⁶ In England, gambling with dice dates back to the advent of the Saxons, Danes, and the Romans.⁷

II. ANTI-GAMBLING LEGISLATION

Attempts were made to restrict gambling quite early in English history; one of the first being an edict issued jointly by Richard the First of England and Philip of France, in 1190, for the regulation of the Christian Army during the Crusade.⁸ This edict is typical of the

¹ Nevada alone seems to be the only jurisdiction in the United States not now prohibiting gambling. In *Nevada Tax Comm. v. Hicks*, 310 P.2d 852 (Nev. 1957), that state's court recognized its unique position when it said: "We note that while gambling, duly licensed, is a lawful enterprise in Nevada, it is unlawful elsewhere in the country, . . ."

² ASHTON, *THE HISTORY OF GAMBLING IN ENGLAND*, (1898).

³ *Ibid.* See also *Foley v. Whelan*, 219 Minn. 209, 17 N.W.2d 367 ().

⁴ *Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327, 135 N.W.2d 318 (1956); *Boies v. Bartell*, 82 Ariz. 217, 310 P. 2d 834 (1957); *State v. One "Jack and Jill" Pinball Machine*, 224 S.W. 2d 854 (Mo. App. 1949).

⁵ ASHTON, *op. cit. supra* note 2, at 2.

⁶ ASHTON, *op. cit. supra* note 2, pp. 3-12. The author demonstrates the existence of gambling in 1600 B.C. by the Egyptians at 3.

⁷ ASHTON, *op. cit. supra* note 2, at 12. The Roman Period from 55 B.C. to 409 A.D. was followed by the Anglo-Saxon influx beginning about 449 A.D., and the period of the Danes' control started in 1017 A.D.

⁸ ASHTON, *op. cit. supra* note 2, at 13. The edict prohibited any person in the army, beneath the degree of knight, from playing at any sort of game for money: knights and clergymen might play for money, but none of them were permitted to lose more than twenty shillings in one whole day and night, under a penalty of one hundred shillings, to be paid to the archbishops in the army. While the monarchs could play for what they pleased, their attendants were limited to the sum of twenty shillings also, and if this ceiling were exceeded, violaors were to be whipped naked through the army for three days.

subsequent statutes in England in the fact that gambling was prohibited selectively; gaming by certain classes of persons,⁹ or at certain times¹⁰ being forbidden. The Statute 33 Henry VIII c.9, of 1542, repealed the various earlier statutes, and therein consolidated the law on the subject.¹¹ However, in and of itself, gambling was not a crime at Common Law, unless it fell within the provisions of a special statute, or when it was a nuisance, tended to immorality or breach of the peace, was against public policy for any reason, or was conducted by fraudulent means.¹²

In the United States, statutes suppressing gambling, and providing for the confiscation of gambling devices appeared early and have almost without exception been upheld as valid under the police power of the States,¹³ or under Congress' power to regulate interstate commerce respectively.¹⁴ The social policy behind the legislation against engaging in gambling seems to be made explicit in *Marvin v. Trout*,¹⁵ where the United States Supreme Court stated:

"It is well settled that the police power of the state may be exerted to preserve and protect the public morals. It may regulate or prohibit any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the habits of those who follow it, or to encourage idleness instead of habits of industry. Whether or not gambling is demoralizing in its tendencies is no longer an open question. Gambling is injurious to the morals and welfare of the people, and it is not only within the scope of the state's police power to suppress gambling in all its forms, but it is its duty to do so."

The extent to which even apparently innocent gambling is involved in organized crime is strikingly illustrated by a perusal of the reports of the current *Senate Committee on Improper Activities in the Labor or Management Field*.¹⁶

⁹ ASHTON, *op. cit. supra* note 2, at 13. The Statute of 24 Henry III, A.D. 1351, prohibited the clergy from playing at dice and chess. See also *United States v. Dixon*, 4 Cranch (C.C.) 107 (D.C. 1830), for a complete analysis of this discriminatory legislation in England.

¹⁰ ASHTON, *op. cit. supra* note 2, at 14. 8 Edward III, A.D. 1334, forbade playing at dice during the Feast of Christmas. See also *United States v. Dixon*, *supra* note 9.

¹¹ *United States v. Dixon*, *supra* note 10.

¹² *Ibid.*; *United States v. Willis*, Fed. Cas. No. 16,728, 1 Cranch (C.C.) 511 (D.C. 1808). See also AM. & ENG. ENCY. (2d ed. 1899) p. 666, citing the English case of *Bell v. Norwich*, 3 Dyer 254b.

¹³ *Farr v. O'Keefe*, 27 F.Supp. 216 (D.C. Miss. 1939); *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1943); *United States v. 65 Slot Machines*, 102 F. Supp. 922 (D.C. La. 1952).

¹⁴ *United States v. 65 Slot Machines*, *supra* note 13; *United States v. Five Gambling Devices*, 119 F. Supp. 641 (D.C. 1954). These cases uphold the constitutionality of a 1951 Federal Statute, 15 U.S.C.A. §1172 (Supp. 1956), which prohibits interstate shipment of certain types of gambling devices.

¹⁵ 199 U.S. 212 (1905).

¹⁶ *Hearings before Select Committee on Improper Activities in the Labor or Management Field*, (Senate) S. 74, 85th Cong., 1st Sess. (1957), pts. 1-11.

To complement and further effectuate the states' various anti-gambling laws,¹⁷ Congress in 1951 enacted into the Federal Code a chapter prohibiting shipment of gambling devices in interstate commerce to any state not affirmatively exempting itself from the operation of the Federal Statute.¹⁸ Construction of this section as extending federal power to prohibit and confiscate the devices to any *intrastate* movement which interferes with, obstructs, or otherwise *directly* affects interstate commerce or federal regulation thereof has been recently affirmed;¹⁹ so that there appears to be left no nebulous area wherein a gambling device might escape confiscation, the states being able to act where the apparatus remains stationary within it, or where in intrastate transportation not directly affecting interstate commerce, and the federal government being able to act upon alternative occurrences.

III. THE PINBALL MACHINE AS A GAMBLING DEVICE

Today, the pinball species of coin-operated slot machines, and many of its various subspecies are familiar to most of the general public due to the widespread installation of these devices in places of public gathering and recreation areas. The typical example of this machine could be described as a rectangular table, whose top surface is slanted and contains differently valued apertures, toward which the operator tries to direct a number of balls, initially by means of a plunger or bar under tension. The object of the game is to attain the highest score, or the right combination of numbers, symbols, figures, etc., for which either nothing more is received, or anything from a mere additional play to a payoff in merchandise or money is awarded the player. Although these games are seemingly trifling in their nature and object,

Testimony here indicates a tie-in between pinball and slot machine interests and unusual union activity, and city, county and state officials in Oregon.

¹⁷ In *Smith v. McGrath*, 103 F. Supp. 286 (D.C. Md. 1952), the court stated: "The main purpose of this chapter dealing with transportation of gambling devices is to aid the states in local enforcement of anti-gambling laws by prohibiting interstate transportation of such gambling devices. . . ."

¹⁸ 15 U.S.C.A. §§1171-1177 (Supp. 1956); especially §1172 which declares: "It shall be unlawful knowingly to transport any gambling device to any place in a state, the District of Columbia, or possession of the United States, from any place outside such state, the District of Columbia, or possession: *provided* that this section shall not apply to transportation of any gambling device to a place in any state which has enacted a law providing for the exemption of such state from the provisions of this section, or to a place in any subdivision of a state if the state in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section."

¹⁹ *United States v. Denmark*, 119 F.Supp. 647 (D.C. Ga. 1954), *affd* 74 S.Ct. 190 (1954); *United States v. Seven Slot Machines and Gambling Devices*, 119 F.Supp. 647 (D.C. Ga. 1954); *United States v. Five Gambling Devices*, 119 F.Supp. 641 (D.C. Ga. 1954). *But note* that these cases carefully stated that purely *intrastate* activity of gambling devices, which had no direct effect on, or did not interfere or obstruct interstate commerce, could not be so regulated under Congress' power over interstate commerce.

they are neither an insignificant part of gambling operations,²⁰ nor is the income derived therefrom unsatisfactory,²¹ nor are the crimes connected thereto inconspicuous.²²

From the prevalent dispersion of these machines, especially in urban areas,²³ and the various estimates of the income they produce,²⁴ it is not unreasonable to view the pinball machine operation as a billion dollar business which is quite unwilling to suspend its activities.²⁵ In New York, an investigation report on pinball operations concluded that the social evils of pinball machines were the same as those presented by the now generally banned slot machines.²⁶ Quite recently in Wisconsin, a bill²⁷ before the State Legislature to permit pinball machines which pay off with free games *only* was defeated by opposition of law enforcement agencies which felt this would open the door for the development of syndicate gambling in that state.²⁸

Although the statutory definitions of "gambling device" differ among the various states, the traditional elements of consideration,

²⁰ *Hearing, supra* note 16; see also BLANCHE, *FACTS AND FALLACIES ABOUT GAMBLING*, 96, 97 (1949).

²¹ *Hearings, supra* note 16, pt. 1 at 224. There one Stanley G. Terry, a Portland, Oregon, pinball machine operator conservatively estimated his annual income from 200 of the devices to amount to \$100,000, *after* a one-half split of the total amount with the owners of the locations where the machines were placed. BLANCHE, *op. cit. supra* note 20, at 94, 95, places as his estimate of the *weekly* total income of the machines from \$50 to \$350, depending upon the volume of play, and the amount of "gimmicking" done to the machine to guarantee more profit.

²² *Hearings, supra* note 16, pt. 1 and 11. See also BLANCHE, *op. cit. supra*, note 20 at 97, where various ways of corrupting law enforcement agencies and officers are discussed.

²³ BLANCHE, *op. cit. supra* note 20 at 96. In 1941, New York City had a total of 11,080 pinball machines operating, with more than this number of machines sold in the city in the preceding year alone.

²⁴ *Ibid.*, at 94, 98. On page 98, the author states that New York City officials, after a thorough investigation, estimated that in 1941 the annual average of from 20 to 23 million dollars was being fed into that city's pinball machines. See also note 21 *supra*.

²⁵ BLANCHE, *op. cit. supra* note 20, at 96, 97, where methods of graft to be used in the protection of the pinball business in California are listed as: "(1) the payment of a flat sum periodically; (2) 'cutting in' public officers for a percentage of the operation; (3) heavy 'campaign contributions' both before and after election. Ways and means were considered of removing various state and local officers who are considered stumbling blocks in the way of the 'industry'."

²⁶ *Ibid.*, at 96. New York's Department of Investigation, headed by William B. Herlands, prepared this report, entitled "Operation of Pin-Ball Machines in New York City."

²⁷ *Bulletin of the Proceedings of the Wisconsin Legislature*, Part II, Assembly, Regular Session (1957), Week Ending September 14, 1957, No. 44A, p. 72. Assembly Bill 44A was amended twice by the Assembly and twice by the Senate before it failed due to the Senate's not concurring in it on June 28, 1957, one day before recess.

²⁸ The Common Council and the Police Department of the City of Milwaukee vigorously opposed passage of this bill; such opposition undoubtedly stemming from the disclosures of the McClellan Rackets Committee of the United States Senate, noted as *Hearings, supra* note 16.

chance and prize²⁹ generally seem to be integrated into these statutes.³⁰ There is little probability that the consideration element will be lacking in the operation of the pinball machine, since the player must deposit a coin of some denomination to initiate the game in the first instance. On the second component, the problem of skill versus chance has arisen in respect to statutes which are not clear,³¹ or where statutes spell out a "predomination" of one over the other.³² Many State statutes³³ and the Federal Statute³⁴ specifically use the test of "an element of chance" thus stifling conflict on this point; however even where not explicit, the judicial construction has reached the same result.³⁵ With few exceptions,³⁶ pinball games have been found to be games of chance;³⁷ the test being whether or not chance is involved when the machine is played by the general public, or an average player, and *not* when operated by a particularly practiced individual.³⁸ The third

²⁹ See note 4 *supra*.

³⁰ See, e.g., WIS. STAT. §945.01 (3), (1955): "A gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value the award of which is determined by chance, even though accompanied by some skill, and whether or not the prize is automatically paid by the machine."

15 U.S.C.A. §1171 (a) (2) (Supp. 1956): "Gambling Device—Any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token or similar object and designed and manufactured so that when operated it will deliver as the result of the application of an element of chance, any money or property."

³¹ *Boies v. Bartell*, 82 Ariz. 217, 310 P.2d 834 (1957), predominant chance being the test; *City of Milwaukee v. Burns*, 255 Wis. 296, 38 N.W.2d 700 (1937), and *State v. Jaskie*, 245 Wis. 398, 14 N.W.2d 148 (1944), using predomination of skill as the test; *Steely v. Commonwealth*, 291 Ky. 554, 164 S.W.2d 977 (1942), element of chance being where outcome depended less on the skill of the player, than on accidental circumstances.

³² See 135 A.L.R. 105: "... questions of skill, chance or mixed skill and chance usually arise where such language is in the constitution, statutes, or ordinances."

³³ See, e.g.: CAL. PEN. CODE §330 b (1), (Deering Supp. 1957), "any element of hazard or chance"; IOWA CODE ANN. §726.5 (1950), "an element of chance"; MICH. STAT. ANN. §28.535 (1954), "game of skill or chance or partly of skill and partly of chance"; OHIO REV. CODE c. 29, §2915.15 (Page, 1954), "as a result of the application of an element of chance"; WIS. STAT. §945.01 (3), (1955), "by chance, even though accompanied by some skill."

³⁴ 15 U.S.C.A. §1171 (a) (2), (Supp. 1956), "... an element of chance ...".

³⁵ See, e.g., *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P.2d 1113 (1941).

³⁶ *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951), where sufficient skill was found in a "Bowling" type pinball game to permit it, in spite of that state's "an element of chance" test. In Wisconsin, the interpretation of the Attorney General, 41 Atty Gen. 111 (1954), was that a bowling-shuffleboard pinball machine was a game of skill, and not a gambling device, although it dispensed coupons redeemable in merchandise.

³⁷ *State v. Paul*, 43 N.J. Super. 396, 128 A.2d 737 (1957); *Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327, 135 N.W.2d 318 (1956); *State v. Jackie*, 245 Wis. 398, 14 N.W.2d 148 (1944); and in *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P.2d 1113 (1941) where the court felt that chance outweighed skill in the ordinary use of the pinball device: "Though evidence shows that a certain degree of skill can be attained through long practice, pinball machines as viewed by the average player or user contain an element of chance which far outweighs that of skill."

³⁸ *State ex rel. Dussault v. Kilburn*, *supra* note 37; *Club 400 v. State ex rel.*

element, that of a prize, is usually the prime factor in determining the illegality of the pinball as a gambling device. However, an extreme minority of states regard the prize element as being immaterial to classification of the machine as acceptable or not.³⁹ What a prize consists of is ordinarily set out in the state statutes, and though differing in form, the basic categories specified are money,⁴⁰ property,⁴¹ thing of value⁴² and sometimes goods, merchandise,⁴³ allowance or credit.⁴⁴ To-

Thetford, 78 So. 2d 819 (Ala. App. 1955); *BLANCHE, op. cit. supra* note 20 at 95, estimates that at most skill constitutes but 10 per cent in the operation of the game.

³⁹ A few jurisdictions hold all pinball machines are gambling devices per se, and the fact that no prize of any kind is awarded is not even considered. In *Stanley v. State*, 194 Ark. 483, 107 S.W.2d 532 (1937), the court was of the opinion that such devices should be banned because "... the only possible use was as a game of chance." *Alexander v. Hunnicutt*, 196 S.C. 364, 13 S.E.2d 630 (1941), determined that even though played only for entertainment, without any prize, it was a gambling device if the element of chance was involved in its operation. However Tennessee apparently has taken the other extreme of allowing pinball machines regardless of a prize being connected thereto. In a 1957 statutory amendment, TENN. CODE ANN. §39-2033 (2) (4), (Heartly Supp. 1957), "pinball machines" are excluded from the "valuable thing" test of the anti-gambling statute, contrary to the originally proposed amendment which exempted only those pinballs offering merely an immediate right to replay. It would seem that here a prize given in the pinball machine category would be inconsequential in determining the illegality of such devices. *But cf. Gayer v. Whelan*, 59 Cal. App.2d 255, 138 P.2d 763, modified, 60 Cal. App.2d 616, 141 P. 2d 514 (1943); *Stirling Distributors, Inc. v. Keenan*, 135 N.J.Eq. 508, 39 A.2d 79 (1944); *Brafford v. Calhoun*, 72 Ohio App. 920, 51 N.E.2d 920 (1943); *Commonwealth v. Mihalow*, 142 Pa. Super. 433, 16 A.2d 656 (1940); all expressing the majority view that ipso facto the pinball machine without a prize is not a gambling device.

⁴⁰ See, e.g., TENN. CODE ANN. §§39-2001, 39-2006 (1955), "money or other valuable thing." This is the most common statutory provision.

⁴¹ See, e.g., ARK. STAT. §41-2003 (1947), "money or property"; C. REV. STAT. §40-10-9 (1953), "money or other property"; and the Federal Statute, 15 U.S.C.A. §1171 (b), "money or property."

⁴² See, e.g., WIS. STAT. §945.01 (3), "something of value." Most state statutes include this definition of prize, using the words "thing of value", "valuable thing", "representative of value", "something of value". Some of the states in this group are: Arizona, ARIZ. REV. STAT. ANN. §13-432 (1956); Connecticut, CONN. GEN. STAT. §8655 (1949); Delaware, DEL. CODE ANN. tit. 11, §666 (1953); Georgia, GA. CODE ANN. §26-6404 (1953); Illinois, ILL. ANN. STAT. c.38, §342 (Smith-Hurd Supp. 1955); Indiana, IND. STAT. ANN. §10-2330 (Burns 1956); Mississippi, MISS. CODE ANN. §2190 (1942); New Jersey, N.J. STAT. ANN. §2A:112-2 (1953); New Mexico, N.M. STAT. ANN. §40-22-1 (1953); New York, N.Y. PEN. LAW §982, subd. 1(a,b), 2, (1953); Ohio, OHIO REV. CODE c.29 §2915.15 (Page 1954); Oregon, ORE. REV. STAT. §167.505 (1955); Pennsylvania, PA. STAT. ANN. tit. 18 §4603 (Purdon 1945); South Carolina, S.C. CODE §1301 (1942); South Dakota, S.D. CODE §24.0204 (1939); Texas, ANN. TEX. STAT. 1A §619 (Vernon 1957); Tennessee, TENN. CODE ANN. §§39-2001, 39-2006 (1955); Utah, UTAH CODE ANN. §76-27-1 (1953); Vermont, VT. STAT. §8558 (1951); Washington, WASH. REV. CODE §9.47 (1953); Wyoming, WYO. COMP. STAT. §9-818 (1945).

⁴³ See *State v. Waite*, 156 Kan. 143, 131 P.2d 708 (1942), interpreting these terms as respecting definitions of a prize.

⁴⁴ See, e.g., ARIZ. REV. STAT. ANN. §13-432 (1956), "checks, credits"; CAL. PEN. CODE §330 b (Deering Supp. 1957), "credit, allowance"; VA. CODE §18-292 (1950), "credit, allowance."

day, in most jurisdictions, the courts have found that any tangible award given or offered a successful player⁴⁵ will be a sufficient prize to place the pinball machine in the prohibited class of gambling devices.⁴⁶ The development of ever stricter legislation in this field has been spurred by the resourcefulness of the slot machine interests in promoting devices which technically did not offer the type of prize prohibited by the then effective statutes, and substituting as inducement something just a little different for the payoff.⁴⁷ The Court in *Moberly v. Deskin*⁴⁸ recognized these attempts to avoid the law's intent, and referring thereto stated:

"In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter, but do violence to the spirit and thwart the beneficent objects and purposes of laws designed to suppress the vice of gambling. Be it said to the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified, and cunning inventions."

IV. THE "FREE REPLAY" LOOPHOLE

The evolution of pinball machines designed to remain effective gambling apparatus, and yet evade the sanction of the law has today reached the stage of the free replay payoff. Since statutory and decisional law had banned almost uniformly any tangible prize,⁴⁹ but statutes generally had not detailed whether or not an additional privilege of operation was included therein,⁵⁰ it appeared that the free

⁴⁵ It appears that whether the tangible award is dispensed by the machine's mechanism, or by actual pay-offs on a non-payout device, the sanction attaches equally. *Cf. Hightower v. State*, 156 S.W.2d 327 (Tex. Civ. App. 1941), where the court held that the illegality of the device hinged upon the nature of the actual use of the machine.

⁴⁶ See *e.g.*: *State v. Jaskie*, 245 Wis. 398, 14 N.W.2d 148 (1944), actual payment in money to player; *Mills v. Browning*, 59 S.W.2d 219 (Tex. Civ. App. 1933), tokens redeemed for money; *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P.2d 1113 (1941), tokens redeemable in merchandise or additional games discharged by the machine; *Kraus v. Cleveland*, 135 Ohio St. 43, 19 N.E.2d 159 (1939), machine discharged tokens usable *only* for a replay; *Urban's Appeal*, 148 Pa. Super. 101, 24 A.2d 756 (1942), free games won actually redeemed for money. *But see*: *Boies v. Bartell*, note 4 *supra*, where the Arizona statute is construed to be limited to tokens or value in the form of money, and playing for other tangible goods is not offensive; *TENN. CODE ANN. §39-2033 (2,4)* (Heartly Supp. 1957), which seems to allow tangible prizes on pinball machines.

⁴⁷ See *People v. Gravenhorst*, 32 N.Y.S.2d 760 (N.Y. Ct. Spl. Sess. 1942).

⁴⁸ 169 Mo. App. 682, 155 S.W. 842 (1913).

⁴⁹ See note 46 *supra*.

⁵⁰ Until quite recently statutes were ambiguous as to the status of the free replay as a prize. Today, although various states have directly included additional operation as a prize, the majority of jurisdictions have had to rely upon decisional law for determination of the replay's status in that particular state.

game would escape condemnation. In *People v. Gravenhorst*,⁵¹ the interaction of attempts to evade the purpose of anti-gambling laws, and remedial legislation is set out as the typical background for the emergence of the replay, a substitute prize:

"The type of machine which first met the condemnation of our courts was one in which the player by inserting a coin had the chance either of losing the amount played, or securing, as a gain, other coins in varying denominations, the payment being in actual money. . . . An obvious effort to nullify the effects of the above [condemnation] was presented when the slot machine interests eliminated pay-offs in money and substituted therefor the return to the successful player of additional merchandise, slugs or tokens, the latter being exchangeable for gum, mints, cigars, etc. Machines of this type were likewise condemned. . . . To avoid judicial disapprobation which the element of chance brought down upon these contrivances, the manufacturers proceeded to introduce a device to indicate in advance of play exactly what the pay-off would be. The court held this subterfuge unavailing, remarking that the player gambles not so much on the immediate return, but on the expectation that the indicator will show an opportunity for profit on his next play. . . . In their ceaseless endeavors to circumvent legislative and judicial condemnation, the contrivers next developed a machine resembling a cash register with a lever on the side, and in the front, a column of packages of mints. Upon the deposit of a coin and the operation of a lever a package of mints was released. In addition the machine caused three cylinders to revolve at different rates of speed. Upon each cylinder were certain symbols and an incomplete sentence. The inscriptions of the three, however, when read together, formed complete sentences of a humorous vein. These machines sometimes delivered metal tokens which were purported to have no cash or trade in value, and to be capable of use only for further amusement. These types of machines were declared illegal in numerous state and Federal decisions. . . . The next development in these machines . . . are known as the pinball type of slot machine. . . . As an added inducement to the playing of these devices, a mechanism is inserted whereby the operator on attaining a certain score, would be entitled to one or more free games which were automatically furnished."⁵²

This latest effort by the pinball industry, it will be seen, has been successful at least partially⁵³ in avoiding disapproval of a machine

⁵¹ 32 N.Y. 2d 760, (N.Y. Ct. Spl. Sess. 1942). This case held that the free play was a "thing of value" within statutory coverage.

⁵² Today, New York explicitly includes the free replay as a prize, and hence such machines are within the condemnation of its anti-gambling laws. N.Y. PEN. LAW §982 subd. 1 (a-b), 2. (1953), forbids a game of chance played for "additional chance or right to use such machine." Case law has further reinforced this position against free play pinball devices by holding that if the machine is even readily convertible into a free replay pinball, it is illegal. *Seaboard N.Y. Corp. v. Wallander*, 192 Misc. 227, 80 N.Y.S.2d 715 (19).

⁵³ Recent statutes specifically exempting the free replay pinball machine from

offering more than a *quid pro quo* for the consideration; however, it has also been responsible for a sharp conflict of opinion among the various states as to the illegality of a free replay machine as a gambling device.⁵⁴ The trend, until quite recently,⁵⁵ seems to have been toward more liberality in regard to this type of game, both by the courts⁵⁶ and by the legislatures.⁵⁷

To understand the division of authority on this point, it is necessary to perceive the divergent rationale behind the decisions on either side. Factors complicating the issue are the considerations as to what type of statute is involved, what type of free play system is used, and even to the personality of the player,⁵⁸ in some instances.

Categorizing the various statutes, there appear to be three main classes: (1) the general, ambiguous acts which leave the courts without guidance in determining whether a particular machine is included as illegal,⁵⁹ (2) those containing partial definitions of what will constitute

condemnation under the anti-gambling laws are: California in a 1950 amendment, CAL. PEN. CODE §330b (4) (Deering Supp. 1957); Illinois in a 1953 amendment, ILL. ANN. STAT. §342 (Smith-Hurd Supp. 1957); Indiana in a 1955 amendment, IND. STAT. ANN. §10-2330 (Burns 1956); Massachusetts in a 1949 amendment, MASS. ANN. LAWS c.140 §177A (1956); Tennessee in a 1957 amendment, TENN. CODE ANN. §39-2033 (2) (4) (Hearty Supp. 1957). For illustrations of case law holding that the additional play machine is not within the statutory test of "property" or "thing of value", see, *e.g.*, respectively: *State v. One "Jack and Jill" Pinball Machine*, 224 S.W.2d 854 (Mo. App. 1949); *Crystal Amusement Corp. v. Northrup*, 19 Conn. Supp. 498, 118 A.2d 467 (1955).

⁵⁴ *Crystal Amusement Corp. v. Northrup*, *supra* note 53; *McNeice v. City of Minneapolis*, — Minn. —, 84 N.W. 2d 232 (Minn. 1957), expressing legality of the free play machine. *But cf.* *Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327, 135 N.E. 2d 318 (1956); *State v. Paul*, 43 N.J. Super. 396, 128 A.2d 737 (1957), finding the same machines unlawful.

⁵⁵ The current Senate Hearings on improper activities in the labor and management field, *Hearings*, *supra* note 16, disclosing the crime and graft connected with the free replay devices, seem to have had the effect of restraining any further liberal tendencies toward allowance of this type of machine. In Wisconsin, a proposed amendment which would have permitted awarding the additional play, was defeated finally on the day before the State Senate's adjournment, June 28, 1957. See note 27 *supra*. Also, the case of *State v. Paul*, *supra* note 54, changed the law in New Jersey, which state had hitherto not prohibited unrecorded free game machines. *State v. Betti*, 23 N.J. Misc. 169 (1945).

⁵⁶ See *e.g.*: *McNeice v. City of Minneapolis*, — Minn. —, 84 N.W. 2d 232 (Minn. 1957), reversing an earlier opinion given by the State Attorney General, Op. Atty. Gen. 733-D, December 12, 1955; *Crystal Amusement Corp. v. Northrup*, 19 Conn. Supp. 498, 118 A.2d 467 (1955).

⁵⁷ See note 53 *supra* for statutes specifically allowing the free play device.

⁵⁸ See *State v. Sandfer*, 93 Okla. Cr. 228, 226 P.2d 438 (1951), where the free replay machine prohibited was in a school area; and the English case, *Roberts v. Harrison*, 25 Times L.R. (Eng.) 700-Div. Ct., where the fact that the chief participants in a free play game were boys from ten to seventeen years old, influenced the outcome of the case.

⁵⁹ See *e.g.*: MINN. STAT. ANN. §614.06 (1947), "Gambling with cards, dice, gaming tables, or any other gambling device whatever is hereby prohibited."; W. VA. CODE §60-10-1 (1951), "Any person who shall keep or exhibit a gambling table, . . . or any other gambling table or device of like kind, . . . shall be guilty of a misdemeanor."

a gambling machine, but which still need clarification when the "free play" devices are encountered,⁶⁰ (3) statutes expressly stating that the free replay pinball machines are embraced within the anti-gambling laws,⁶¹ or are excluded therefrom.⁶²

Relatively few jurisdictions today have retained the vague and indefinite type of anti-gambling legislation which typifies the old wide-sweeping statutory condemnations of the vice of gambling. Due to the difficulty of application in specific cases,⁶³ and the incongruous result of sometimes ostensibly defeating the legislative intent behind these laws,⁶⁴ remedial modifications effected in the bulk of the states have extended their statutes so as to cover contemporary gambling problems more specifically.⁶⁵ The interpretations of the general form of gambling suppression still in use in a diminishing number of states, appears to favor the view that the free replay device is *not* within the contemplation of their laws. A 1957 *Minnesota* case,⁶⁶ in determining that a pinball machine offering additional plays for a high score was not barred by a statute declaring "Gambling with cards, dice, gaming tables, or any other gambling device whatever, is prohibited." [This writer's italics],⁶⁷ showed that its court was of the persuasion that the majority rule excluded such devices.⁶⁸ More strict yet was the construction that

⁶⁰ Where the statutes use the "property" or "thing of value" test, the question is whether or not a free replay is within this type of gambling device definition.

⁶¹ N.Y. PEN. LAW §982 subd. 1(a-b), 2. (1953) forbids a game of chance played for "money, thing of value, or additional chance or right to use such machine . . ."

⁶² See note 53 *supra*.

⁶³ The interpretation that the Minnesota court gave to its rather general anti-gaming statute, when faced with an extra game machine, was based upon the idea that a free replay was not property or a thing of value, although the statute makes no mention of such criteria as determinative of legality in that state. MINN. STAT. ANN. §614.06 (1947); *McNeice v. City of Minneapolis*, — Minn. —, 84 N.W.2d 232 (Minn. 1957).

⁶⁴ In *State v. Calandras*, W. Va. 86 S.E.2d 242 (1955), the court felt that a slot machine, upon which actual pay-offs were made, was not unlawful as a gambling device because it was not a "device of like kind" to those specifically elicited in an earlier clause of the statute. W. VA. CODE §60-10-1 (1951). It seems the court was giving the restrictive doctrine of *ejusdem generis* a pointed application here, as well as the idea of strictly construing gambling legislation.

⁶⁵ Some statutes now use the "thing of value" test, see note 42 *supra*; some are very precise in stating a permission or allowance of the free play type of machine, see note 53 *supra*. The Virginia statute, VA. CODE §18-292 (1950), in barring free replay machines, exemplifies a well-drafted law; it states that a gambling device is one by which: ". . . the user (a) may become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade; or (b) may secure additional chances or rights to use such machine, apparatus, or device . . ."

⁶⁶ 84 N.W.2d 232 (Minn. 1957).

⁶⁷ MINN. STAT. ANN. §614.06 (1947).

⁶⁸ Stating that the majority holding was that where free replay pinball devices were not mentioned, the free replay was neither property nor a thing of value, the court appears to use these tests, although they do not appear in the pertinent

the court in a West Virginia case⁶⁹ gave to that state's section:⁷⁰

"Any person who shall keep or exhibit a gambling table, commonly called A.B.C. or E.O. table, or faro bank, or keno table, or any other gambling table or device of like kind . . . or concerned in interest [therein] . . . shall be guilty of misdemeanor." [Emphasis supplied.]

In finding that a "free play" type of slot machine, upon which actual pay-outs in money had been made was *not* a gambling device under the statute, it was stated:⁷¹

"The evidence however, does not establish that the device was an 'A.B.C. or E.O. table, or faro bank, or keno table, or any other gambling table or device of like kind'. The device in question is referred to in the testimony as being similar to a 'slot machine' or 'one armed bandit', but we cannot assume that such devices are of 'like kind' to those named in the statute. The mere fact that the device could possibly be used or adapted to gambling does not make it of 'like kind'. The burden was on the State to establish that the table or device involved in this proceeding was one condemned by the statute. This, we think, it did not do."⁷²

The obvious inadequacy of such broadly expressed prohibitions points up the need for legislative revision, establishing a more fixed and reliable standard for the determination of gambling devices.

It is particularly within the second class of gaming laws that the abrupt, diametrically opposite conclusions have been reached respecting the legality of the free play device; such conflicts occurring often under statutes basically identical. Since the vast majority of the states' statutes are contained in this category, the resultant split of authority where legislative provisions partially assist the courts, but are not precise in reference to pinball machines, especially the free replay variety, should be examined in detail.

A small segment of states in this second group, whose statutes use only the "game of chance"⁷³ test without requiring a prize of any kind, have held this type of machine to be a gambling device.⁷⁴ This seems to be in accord with the general rule, *supra*,⁷⁵ determining all pinball machines to be games of chance rather than of skill. However the

statute. However, the presumed legislative intent seems to be given much weight here, and the decision rests principally on both these bases.

⁶⁹ See note 64 *supra*.

⁷⁰ W. VA. CODE §60-10-1 (1951).

⁷¹ See note 64 *supra*.

⁷² Contrast the reasoning here with that expressed in *Stanley v. State*, 194 Ark. 483, 107 S.W.2d 532 (1937); *Alexander v. Hunnicutt*, 196 S.C. 364, 13 S.E.2d 630 (1941), where very severe attitudes against pinball machines offering no prizes at all are evinced.

⁷³ ALA. CODE tit.14 §283(d), (1940); MICH. STAT. ANN. §28.535 (1954).

⁷⁴ See *e.g.*, *Club 400 v. State ex rel. Thetford*, 78 So.2d 819 (Ala. App. 1955); *Oatman v. Davidson*, 310 Mich. 57, 16 N.W.2d 665 (1945).

⁷⁵ See note 37 *supra*.

marked disparity of interpretation occurs under those statutes which *do* include the award element in their definition, but take opposite stands upon the question of whether or not the free replay constitutes such prize. Where the laws forbid pinball devices paying out "money or property",⁷⁶ it is apparent that the additional play does not constitute "money",⁷⁷ and the "property" test remains the criterion. Both the State⁷⁸ and the Federal⁷⁹ courts today support the view that free games do not constitute property within the meaning of such statutes. What the property test encompasses, and that the free play benefit is not therein included, was clearly stated by the court in *Washington Coin Machine Assn. v. Callahan*.⁸⁰

"The term property as used in the anti-gambling statutes included goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, or money, or right or title to property, real or personal is created or transferred; but none of such terms should be expanded to include a free amusement feature, such as the privilege of playing an additional free game if a certain score is made."

In spite of the authority *contra*, some states by enlargement of property theories,⁸¹ and without abandoning an apparently obsolete definition,⁸² have managed to include the free play within the term.

Those statutes condemning gambling apparatus upon which a reward of a "thing of value",⁸³ "representative of value",⁸⁴ or "valuable thing"⁸⁵ may be won, have plunged the courts into a hardly insignificant conflict in this area. A majority of the state courts are faced with this test,⁸⁶ and the different outcome of the cases under similar circumstances can only be explained in the light of the court's rationale in a particular jurisdiction. While it would appear that the greater number of states are inclined to follow the view that a "thing of value" does

⁷⁶ See note 41 *supra*.

⁷⁷ See *e.g.*, *Stoutamire v. Pratt*, 148 Fla. 960, 5 So.2d 248 (1941).

⁷⁸ See *e.g.*: *State v. One Bally Coney Island No. 21011 Gambling Device*, 174 Kan. 757, 258 P.2d 225 (1953); *State v. One "Jack and Jill" Pinball Machine*, 224 S.W.2d 854 (Mo. App. 1949). *Contra*, *Baedar v. Caldwell*, 156 Neb. 489, 56 N.W.2d 706 (1953).

⁷⁹ See *e.g.*, *Washington Coin Machine Assn. v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944).

⁸⁰ See note 79 *supra*.

⁸¹ *Baedar v. Caldwell*, 156 Neb. 489, 56 N.W.2d 706 (1953); *Middlemas v. Strutz*, 71 N.D. 186, 299 N.W. 589 (1941); *State v. Sandfer*, 93 Okla. Cr. 228, 226 P.2d 438 (1951); *State v. Larrimore*, 293 S.W.2d 277 (Tex. Civ. App. 1957).

⁸² The term "property" should be strictly construed in its legal sense, and not stretched so as to fulfill legislative intent; it seems that statutory revision is demanded. However, in many such revisions, the old "money or property" definitions have been amended to the more popular "thing of value" term, and while this term is more applicable in the realm of free game machines, there are still problems of interpretation.

⁸³ See *e.g.*, OHIO REV. CODE c.29 §2915.15 (Page 1954).

⁸⁴ See *e.g.*, ARIZ. REV. STAT. ANN. §13-432 (1956).

⁸⁵ See *e.g.*, MISS. CODE ANN. §2190 (1942).

⁸⁶ See note 42 *supra*.

include the free replay,⁸⁷ their reasons vary, and an ever-stronger minority has challenged the former rule. Perhaps the explanation of the failure of the minority view here to prevail over the other, is that often where conflicts arose, legislative revision determined specifically the status of the free play type machine.⁸⁸

A recent Ohio case, *Westerhaus v. City of Cincinnati*,⁸⁹ summarizes the opinions of many states⁹⁰ which hold the free replay game a sufficient "thing of value" on the basis of extra amusement:

"Amusement is a thing of value. Were it not so, it would not be commercialized. The less amusement one receives, the less value he receives; and the more amusement, the more value he receives. Whoever plays the device and obtains tokens⁹¹ therefrom, receives more value for his nickels, with respect to the amount of amusement obtained, than the player who receives none at all, . . . the greater the amount of amusement received, the more valuable the prize. The minimum amount of amusement offered in each play is that which is offered without any return of tokens. Whatever amusement is offered through the return of tokens⁹² is added amusement which a player has an uncertain chance of receiving. This added amount of amusement, the procurement of which is dependent wholly upon chance, is a thing of value. . . .

"Since amusement has value, and added amusement has additional value, and since it is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game three elements of gambling, namely, chance, price, and a prize." [This writer's italics.]

This well-reasoned explanation has been complemented by another theory under which the free game device has been disapproved; the latter having more noticeable social policy overtones. Jurisdictions sharing this view that an extra opportunity to play the pinball machine is a "thing of value", because anything which affords the necessary lure to indulge the gambling instinct⁹³ fulfills that requirement, appear

⁸⁷ See e.g., *Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327, 135 N.W.2d 318 (1956); *Holliday v. Governor of State of South Carolina*, 78 F.Supp. 918, (D.C. S.C. 1948), *aff'd* 335 U.S. 803; *State v. Bally Beach Club Pinball Machine*, 119 Vt. 123, 119 A.2d 876 (1956); *City of Milwaukee v. Burns*, 225 Wis. 296, 38 N.W.2d 700 (1937).

⁸⁸ See note 53 *supra*.

⁸⁹ 165 Ohio St. 327, 135 N.W.2d 318 (1956).

⁹⁰ See note 87 *supra*.

⁹¹ The court was quoting with approval an earlier Ohio case, *Kraus v. Cleveland*, 135 Ohio St. 43, 19 N.E.2d 159 (1939), which involved a machine issuing tokens for free replays. However, in the principal case, the additional game was awarded automatically by the machine upon player's pushing button, and except for this difference, the reasoning is applicable as well here.

⁹² *Ibid*.

⁹³ See e.g.: *Hunter v. Mayor and Council of Teaneck Tp.*, 128 N.J.L. 164, 24 A.2d 553 (1942); *Holliday v. Governor of State of South Carolina*, 78 F.Supp. 918 (S.C. 1948), *aff'd* 335 U.S. 803; *Painter v. State*, 163 Tenn. 627, 455 S.W. 46 (1932).

to be liberalizing, by interpretation, their anti-gambling laws⁹⁴ in order to effectuate and promote the public policy behind them.⁹⁵ The justification for thus denouncing machines awarding free games was aptly set forth in *People v. Cerniglia*,⁹⁶ where the court stated that it would not be misled

"... by the apparent harmlessness of awarding free games, inasmuch as that is an incentive that fosters the gambling spirit, and that the element of chance is always present in respect to these machines, and combining the element of chance with the inducement of receiving something for nothing results in gambling."

These two modes of regarding the free replay as within the censure of statutes using the "thing of value" test have, although representing the weight of authority, been resisted in states using substantially the same definition of prize. Arizona has indicated that the expression "representative of value" is limited to tokens representing money or value *in the form of money*,⁹⁷ while cases in Connecticut⁹⁸ and Pennsylvania⁹⁹ have treated the additional game as only trivial amusement, not includible as the element of award necessary to the illegality of a gambling device. Many other states which also had construed free games to be without the "thing of value" concept, have since amended their statutes to specifically exempt such type machines from operation of their gambling laws.¹⁰⁰

Another statutory definition of a gambling machine uses the "uniform and fair return" test as determinative of a prize.¹⁰¹ Although this standard effectively bars the free replay because of the uncertainty intrinsic in that machine, it does not explicitly refer to the extra game situation, as do many legislative revisions. The idea of a uniform

⁹⁴ Anti-gambling statutes, as penal laws, should be strictly construed; however, where legislative intent is evidently *contra*, or when the courts feel that it would limit the meaning of a word or phrase in the gaming statute, so as to defeat the law, then the strict interpretation doctrine, and the rule of *ejusdem generis* will *not* be followed. *Von Pelt v. State*, 193 Tenn. 463, 246 S.W.2d 87 (1952).

⁹⁵ See note 15 *supra*.

⁹⁶ 170 Misc. 631, 11 N.Y.S.2d 5 (1939).

⁹⁷ *Boies v. Bartell*, 82 Ariz. 217, 310 P.2d 834 (1957). Under this interpretation, a prize of merchandise would be legal.

⁹⁸ *Crystal Amusement Corp. v. Northrup*, 19 Conn. Supp. 498, 118 A.2d 646 (1955); CONN. GEN. STAT. §§8655, 8656 (1949).

⁹⁹ *In re Wigton*, 151 Pa. Super. 337, 30 A.2d 352 (1943); PA. STAT. ANN. tit.18 §§4603, 4605 (Purdon 1945).

¹⁰⁰ See *e.g.*: Illinois, ILL. ANN. STAT. §342 (Smith-Hurd Supp. 1957); Indiana, IND. STAT. ANN. §10-2330 (Burns 1956); Tennessee, TENN. CODE ANN. §39-2033 (2) (4), (Heartly Supp. 1957).

¹⁰¹ See *e.g.*, S.C. CODE §§1301, 1301-1(2), (1942). Under South Carolina law, any machine not giving uniform and fair return in value for each coin deposited, and in which there is any element of chance, is a gambling device, as tending to promote and encourage the gambling instinct. FLA. STAT. ANN. §849.16 (1941), prohibits machines with an element of chance or unpredictable outcome.

and certain return for consideration is often expressed with the argument that any inducement to the gambling instinct is a "thing of value",¹⁰² even though the statutes involved fail to mention any such thought.

Anti-gambling laws and amendments which expressly state, in precise language, what the status of the free replay is in that particular jurisdiction, are the most recent legislative development responding to the problems raised by that device. A proportionately larger number of states which have particularized the legal position of the free game pinball machine have favored excluding it from illegality.¹⁰³ The methods of approving this machine have taken the forms of deeming the game one predominantly of skill,¹⁰⁴ deeming it primarily amusement,¹⁰⁵ presuming the free replay not a "thing of value",¹⁰⁶ excluding it from general gambling laws where some skill is involved,¹⁰⁷ and the ultra-liberality of excluding pinball machines generally from the effect of the gaming statute.¹⁰⁸ In spite of the fact that few legislatures¹⁰⁹ have felt the need to condemn the additional plays device specifically, in those states which allow it a further differentiation is made upon the method of awarding the free replay. In Indiana, for example, although a 1955 amendment took automatically, mechanically awarded free replay machines out of the effective anti-gambling statute, a *metered* free play device was held subject to destruction as a gambling machine.¹¹⁰ A proposed 1957 amendment to the Wisconsin Criminal Code would not have affected the illegality of a pinball machine record-

¹⁰² See note 93 *supra*.

¹⁰³ See note 53 *supra*.

¹⁰⁴ CAL. PEN. CODE §330b (4), (Deering 1957); here excluded from the definition of a slot machine or device are "... pinball and other amusement machines or devices which are predominantly games of skill, whether affording opportunity of additional chances of free plays or not."

¹⁰⁵ MASS. ANN. LAWS c.140 §177A (1956).

¹⁰⁶ IND. STAT. ANN. §10-2330 (Burns 1956), presumes an immediate, mechanically conferred free replay to be without value.

¹⁰⁷ ILL. ANN. STAT. §342 (Smith-Hurd Supp. 1957). Under this statute the pinball machine awarding the free replay must have its operation depend "in part upon skill". How ridiculously easy this requirement is to satisfy in Illinois is seen by the statement of the court in *People v. One Mechanical Device or Machine Designated as Bally Dude Ranch Serial No. C-2603*, 9 Ill. App.2d 38, 132 N.E.2d 338 (1957): "In a statute imposing a penalty for operating a gambling device, and exempting from its operation coin operated devices which, inter alia, depend 'in part' on skill of the player, 'in part' does not mean a modicum, minimal amount, or scintilla of skill, but means something about which one can reasonably either feel or talk, and still not be feeling or talking about nothing or next to nothing."

¹⁰⁸ TENN. CODE ANN. §39-2033 (2) (4), (Heartly Supp. 1957). It appears that here the legislative intent was to remove all pinball games from condemnation, because the amendment as originally proposed exempted *only* machines offering an immediate right to a free replay, however this limiting language was dropped before the passage of the general exemption in 1957.

¹⁰⁹ See *e.g.*, N.Y. PEN. LAW §982 subd. 1(a-b), 2. 1953); VA. CODE §18-292 (1950).

¹¹⁰ *Tinder v. Music Operating Inc.*, 142 N.E.2d 610 (Ind. 1957).

ing free plays awarded by it.¹¹¹ These statutes specifying that an "additional chance or right to use" the pinball satisfies the prize element of a gambling device,¹¹² have without difficulty settled the free replay question adversely to the slot machine interests.¹¹³

The type of system used to reward the free replay won is also a factor which appears to be determinative of its approval or disapproval. Where free games have been actually redeemed for money, merchandise, or in trade, it is manifest that the machine constitutes a forbidden device, and the courts have, with uniformity, so held.¹¹⁴ Similarly where tokens are discharged by the machine, which are exchangeable for money, merchandise, or for additional plays, the machines have met condemnation.¹¹⁵ Tokens awarded which are convertible *only* into free games,¹¹⁶ or can be used *only* for amusement on another game,¹¹⁷ are likewise sufficient to denote the device unlawful in a majority of the courts.¹¹⁸ However, when the replay privilege is automatically awarded by the machine, the objection to a tangible prize¹¹⁹ has been evaded, and only the decisive distinction between unrecorded and metered or recorded extra games remains. The object of this rather recent test, applied where the free replay is permitted under general,¹²⁰ partially definitive,¹²¹ or specific statutes¹²² is to diminish the danger of actual pay-offs made on the number of additional plays, by eliminating any accurate registration of such to determine pay-off amounts. This added precaution seems to recognize, of necessity, the inherent tendency and actual practice of using such devices for gambling purposes.

Still another consideration involved in the rationale of certain courts which have faced the free replay type of pinball machine, is that of the age and disposition of the principal players thereof. On the basis of the minority¹²³ of operators, and where such devices are within a school area,¹²⁴ courts have determined these machines undesirable and illegal.

¹¹¹ See note 27, *supra*. The final amended bill which failed to get the senate's concurrence, provided that the free replay sought to be permitted would be automatically, immediately, awarded, without any recordation as to number of pay-offs in free games.

¹¹² See note 109 *supra*.

¹¹³ See *e.g.*, *People v. Blakeslee*, 309 N.Y. 829, 130 N.E.2d 619 (1955).

¹¹⁴ See note 46 *supra*.

¹¹⁵ See *e.g.*, *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P.2d 1113 (1941).

¹¹⁶ See *e.g.*, *Kraus v. City of Cleveland*, 135 Ohio St. 43, 19 N.E.2d 159 (1939).

¹¹⁷ See *e.g.*, *Painter v. State*, 163 Tenn. 627, 45 S.W.2d 46 (1932).

¹¹⁸ See note 46 *supra*.

¹¹⁹ *Ibid.*

¹²⁰ See *McNeice v. City of Minneapolis*, 84 N.W.2d 232 (Minn. 1957).

¹²¹ See *e.g.*, N.H. REV. STAT. ANN. §577-11 (1955); *State v. One "Jack and Jill" Pinball Machine*, 224 S.W.2d 854 (Mo. App. 1949).

¹²² See note 110 *supra*.

¹²³ See *Roberts v. Harrison*, 25 Times L.R. (Eng.) 700-Div. Ct. (1909). The court here found that boys between ten and seventeen used the machine principally, and based the decision upon this age factor.

¹²⁴ *State v. Sandfer*, 93 Okla. Cr. 228, 226 P.2d 438 (1951).

This tendency to protect especially persons in their immature and formative years stems from the social policy of extra-cautiousness in matters affecting minors. In coincidence with this factor, the "inducement" or "lure" to the gambling instinct is found as additional argument for the prohibition of the pinball machines in this category.¹²⁵

V. CONCLUSION

Although until quite recently there appeared to be a growing trend toward approval of the free replay pinball machine, both under interpretations of the "thing of value" standard, and statutory amendments, the weight of authority today maintains the view that it is a gambling device. The argument that amusement has "value" would seem to be the most logical and reasonable basis for condemnation under laws not particularizing the status of the free play machine. The somewhat strained conception of the "property" theory to include this device, as well as the more liberal construction of anti-gambling statutes for policy reasons directed toward the same purpose, could be avoided by precise legislative terminology designating the legal status of the free play machine. It is this author's opinion that currently there is a tendency to revert to the idea of banning this sort of contrivance,¹²⁶ which, it appears, is inspired by disclosures of the present McClellan Committee of the Senate,¹²⁷ and by police opposition based upon actual abuses closely connected with the device.

The social policy behind the anti-gambling laws opposes any means of eliciting the gambling instinct in man so as to involve him in that unproductive enterprise with its usual criminal connotations. This policy would not be fulfilled if the free play were permitted to become a substitute prize, albeit trivial, which could arouse that instinct, and become a forerunner of gambling in a more substantial degree. It is this writer's opinion, however, that psychologically, the deep-rooted motivation to gambling cannot be completely stifled. Gambling has existed to some degree throughout our history, in spite of various prohibitory measures, and, practically, there appears to be slight chance of stamping out gambling on pinball machines altogether, even though the free replay would be eliminated.

Conceding that a certain amount of gambling will occur practically, the curtailment of the vice by means of regulation of the pinball device, it will be seen, at least discourages gambling to some extent by its sanction, and makes impracticable organized gambling operations *via* this machine. This alone would satisfy the public policy sufficiently to justify prohibiting this type of machine.

¹²⁵ See note 123 *supra*; the court also felt that the machine encouraged the "spirit of gambling".

¹²⁶ See note 55 *supra*.

¹²⁷ *Hearings, supra* note 16.

While it can be argued that by offering this limited gambling arrangement, a lawful inducement for which to play, more serious and substantial gambling might be reduced, practical experience has shown¹²⁸ that *not* less, but very much more illegal gaming activity springs from such relaxation of the strict prohibition of this mode of gambling. Thus the prevailing view, that a free-replay machine is a gambling device, supported by the well-reasoned "value" theory, and by practical as well as policy reasons, appears to be most efficacious in attaining the desired result.

ROBERT J. URBAN

¹²⁸ *Ibid.*